

**OPEN RECORDS AND MEETINGS OPINION
2003-O-02**

DATE ISSUED: February 21, 2003

ISSUED TO: James River Senior Citizen's Center

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from James Tanata asking whether the James River Senior Citizen's Center violated N.D.C.C. § 44-04-18 by refusing to release its payroll records.

FACTS PRESENTED

On August 1, 2002 James Tanata made a request to the James River Senior Citizen's Center, Inc. (Senior Center) for its board minutes and payroll records from August 1, 2001 to July 31, 2002, in addition to documents containing the pooled costs and percentage amount charged to each department. Carol R. Wright, the director of the Senior Center agreed to provide Mr. Tanata with the board minutes and the documents containing the pooled costs and percentage amount charged to each department.

On August 21, 2002, Mr. Tanata again requested the payroll records from August 2001 to August 2002. He stated in the letter that he did not want social security numbers, birth dates, phone numbers or addresses. Ms. Wright replied by a letter dated August 23, 2002, informing Mr. Tanata that the board of directors voted to deny his request due to the potential violation of the employees' right to privacy.

The Senior Center is a nonprofit corporation. It administers programs in three counties: Stutsman, Wells, and Sheridan. It receives funding from the following sources: federal transit funding passed through the North Dakota Department of Transportation; N.D.C.C. ch. 39-04.2 state aid for public transportation; Title III Aging Services grant; United States Department of Agriculture (USDA); county mill levy; United Way grant; and fund raising, memorials, bequests or donations.

ISSUES

1. Whether the James River Senior Citizen's Center is a public entity subject to the open records and meetings laws.

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2. Whether the James River Senior Citizen's Center violated N.D.C.C. § 44-04-18 by refusing to release its payroll records.

ANALYSES

Issue One:

The North Dakota open records law, N.D.C.C. § 44-04-18, applies to "records" of a "public entity" as those terms are defined in N.D.C.C. § 44-04-17.1(12) (15); N.D.A.G. 99-O-03. The fact that the Senior Center is a non-profit corporation does not prevent it from being subject to the open records law. In previous opinions, this office has found that a non-governmental organization, even if formed as a private non-profit corporation, may nevertheless be a "public entity" if it is supported by public funds, expends public funds, or is acting as an agent of government.¹ See N.D.C.C. § 44-04-17.1(12) (definition of "public entity"); N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10; N.D.A.G. 2000-O-07; N.D.A.G. 99-O-03; N.D.A.G. 98-O-23; N.D.A.G. 98-O-21. There are two tests that are appropriate to determine whether the Senior Center is a public entity: the "agency of government test" and the "supported by public funds test." See N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10. I will examine each in turn.

A non-governmental organization can be a "public entity" if it is acting as an agent or agency of government. N.D.A.G. 2001-O-11; N.D.A.G. 2001-O-10; N.D.A.G. 98-O-21. This test examines the types of services provided by the organization and whether the governmental agency has delegated its authority to a non-governmental organization. The Senior Center provided this office with documentation of its funding sources. Nothing indicates that the Senior Center is acting pursuant to authority delegated to the Senior Center by a governing body of a public entity.

Therefore, to determine whether the Senior Center is subject to the open record laws, it must be determined whether or not it is supported in whole or in part by public funds as defined in N.D.C.C. § 44-04-17.1(9). See N.D.A.G. 99-O-03. The "supported by public funds" test examines whether or not an organization is receiving public funds in exchange for goods or services having an equivalent fair market value. N.D.A.G. 2001-O-10. An organization is not supported by public funds if the public funds it receives are provided in

¹ A non-governmental organization may also be a "public entity" and fully or partially subject to the open records and meetings laws if it is delegated authority by a governing body of a public entity, (see N.D.C.C. § 44-04-17.1(6) (definition of "governing body")), or if the organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a)(definition of "public entity")

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exchange for goods or services having an equivalent fair market value. N.D.C.C. § 44-04-17.1(9); N.D.A.G. 2002-O-09; N.D.A.G. 2001-O-10.

The Senior Center argues that the public funds it receives are pursuant to reimbursement contracts. They cite an opinion this office issued to the Department of Human Services that states that an organization receiving public funds under a contract with a state agency is not "supported in whole or in part by public funds," even if the contract is entitled "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds the organization receives. N.D.A.G. 98-F-19. Reliance on this opinion is correct when considering the funding the Senior Center receives pursuant to grant agreements or reimbursement contracts with state agencies for various state and federal funds.² It is my opinion that the funds from these grants are received pursuant to specific reimbursement contracts for reasonably identified goods and services at fair market value.

The remaining funding source to be examined is mill levy money that the Senior Center receives pursuant to N.D.C.C. § 57-15-56 from Stutsman, Sheridan and Wells Counties. A county is authorized in § 57-15-56 to levy a tax:

For the purpose of establishing or maintaining services and programs for senior citizens including the maintenance of existing senior citizen centers which will provide informational, health, welfare, counseling, and referral services for senior citizens, and assisting such persons in providing volunteer community or civic services.

N.D.C.C. § 57-15-56(1). This state law also provides:

To receive any funds under this section, an organization or agency must file with the governing body from which funds are being requested a report of its program for the fiscal year for which the funds are requested. The report must show all financial resources available to the organization or agency and its program, how those resources are budgeted or intended to be used in that fiscal year or in the future, and the purposes for which funds being requested under this section are to be used.

N.D.C.C. § 57-15-56(2).

² The Senior Center has grant agreements or reimbursement contracts for the §18/5311 federal transit funding; the money received from the USDA; the N.D.C.C. ch. 39-04.2 state aid for public transportation funds; and the state and federal money received under the Title III Aging Services grant.

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The Senior Center does not have to competitively bid for the funds or sign a contract for services to receive the mill levy money. As indicated above, it does have to file reports of its program's financial resources and keep the proceeds from the tax in a separate fund. N.D.C.C. § 57-15-56(1). Also, the report must show the purposes for which the mill levy funds will be used. A report reviewed by our office indicates that the mill levy funds will be used by the Senior Center for transportation, meals, outreach, health screenings, and building repair and maintenance. There is no specific contract with the county for specific services to be provided in exchange for the mill levy money. The Senior Center has the discretion to decide how the mill levy funds are spent within these general areas.

This situation is very similar to one addressed in a 1999 opinion which determined that the Fort Berthold Coalition Against Domestic Violence was a public entity for the purposes of the open records law. N.D.A.G. 99-O-03. As in this situation, the Coalition had some discretion over the use of the funds. Id. This office said:

These subsidies are exactly the type of payment of public funds intended to be addressed by N.D.C.C. § 44-04-17.1(12)(c). Unless the public is allowed to have access to the records of the organization supported by the funds, there is no way for the public to know how its funds are being used.

Id.

The amount of mill levy money the Senior Center receives is actually a small percentage of its total budget. The director explained that the money is used to supplement the other programs. The amount of funding alone is not determinative of whether an organization is supported by public funds. N.D.A.G. 2001-O-11 (economic development corporation is supported by public funds when considering the total amount of funds, coupled with an indistinct contract).

In conclusion, it is my opinion that the Senior Center is supported by public funds as a result of its receipt of mill levy money and is therefore a public entity for the purpose of the open records law.

Issue Two:

Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours. N.D.C.C. § 44-04-18. The public business of the Senior Center consists of all matters that relate or may foreseeably relate to how it spends the public funds it receives from the county mill levy. Except for information protected from public disclosure by other state laws, all

records of the Senior Center regarding its use of the mill levy funds are open to the public.³ If those funds have been pooled with other revenue of the Senior Center, and not segregated in a separate account, then all financial records of the Senior Center must be open to the public. N.D.A.G. 99-O-03. See also N.D.A.G. 98-O-24 (payments for general support can be placed in context only by reviewing the organization's overall finances). The requestor has asked for payroll records. The director of the Senior Center indicated that she could not guarantee that mill levy money was not used for employee salaries. Therefore, it is my opinion that money was used for employee salaries and consequently the payroll records are open to the public.

CONCLUSIONS

1. It is my opinion that the James River Senior Citizen's Center is a public entity subject to the open records and meetings laws to the extent its records or meetings pertain to the mill levy funds it receives from the counties. Because the mill levy funds have been used in part for employee salaries, the payroll records must be open to the public.
2. It is my opinion that the James River Senior Citizen's Center violated N.D.C.C. § 44-04-18 by refusing to release its payroll records.

STEPS NEEDED TO REMEDY VIOLATION

The Senior Center must provide Mr. Tanata, a copy of the payroll records he requested.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

³ All meetings of a governing body of the Senior Center regarding its use of the mill levy funds must also be open unless otherwise specifically provided by law. N.D.C.C. § 44 04-19.

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